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No. 06-457

Supreme Court, U.S.
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In The Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE UNITED STATES

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SUPPLEMENTAL BRIEF IN RESPONSE TO THE UNITED STATES

Petitioner files this supplemental brief in response to the United States' brief recommending denial of the petition. The United States rejects much of the reasoning of the First Circuit and respondents, ultimately agreeing with the appeals court's judgment only because of several flawed premises, perhaps the most important being the supposition that the decision has little if any effect on law enforcement.

DISCUSSION

1. Maine wants to successfully prosecute anyone, including a carrier, who delivers tobacco to children. No regulatory scheme is effective unless it can be enforced in court. No one thus far in the filings with this Court disagrees that the primary way to prosecute a person for furnishing tobacco in a package to a child is to present evidence in court that the package has markings or labels on the outside that indicate the package contains tobacco products. The practical problem, ignored by the United States, is that under the First Circuit decision regarding the second part of 22 Me. Rev. Stat. Ann. § 1555-D, Maine cannot use this evidence against a carrier.[1]

The United States asserts that carriers may be "subject to generally applicable laws that prohibit furnishing tobacco to minors," and appears to approve of state laws that "ban[] outright the direct shipment of cigarettes to individual

[1] The fact that markings and labels are the best indication that a package contains tobacco products is demonstrated by the tobacco settlement agreement between UPS and New York, under which UPS inspects the outside of packages for tobacco labels and markings.

consumers." United States Br. at 11, 18. Maine has a general prohibition against any person furnishing tobacco to children. 22 Me. Rev. Stat. Ann. § 1555-B(2) ("A person may not sell, furnish, give away . . . a tobacco product to any person under 18 years of age"). The practical question is how does a state enforce even such a "general" law when prosecuting a carrier in court? This is a question that the United States sidesteps. The only identified means, of course, is to put into evidence a label or marking from the outside of the package – to impute knowledge, which is all that the second part of section 1555-D calls for. But the First Circuit held that Maine can do nothing – directly or indirectly – that has the effect of forcing a carrier to change its uniform procedures, and that imputing knowledge has that effect. (Pet. App. 28). If Maine or another state attempted to introduce such evidence, carriers would certainly argue that use of such evidence to enforce a "general" law against a carrier would require the carrier to take account of these markings and labels, thus affecting its uniform procedures, which is proscribed by the First Circuit decision. The brief of the amici states highlights the practical importance of this issue. *Brief Amicus Curiae of the State of California and 35 Other States in Support of the Petition* at 7-8. Even the appeals court alluded to these practical difficulties. (Pet. App. 28-29).

Respondents do not concede that Maine or another state could use such evidence to enforce "general" laws or bans. Carriers elsewhere challenged just such a ban against tobacco deliveries to consumers. *New York State Motor Truck Assoc. v. Pataki,* 2004 U.S. Dist. Lexis 25519 (S.D. N.Y. 2004). If the United States proposes that the Federal Aviation Administration Authorization Act of 1994 (FAAAA) permits the use of evidence of markings and

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labels in a prosecution pursuant to a "general" law or ban, but not pursuant to a law that specifically identifies that evidence, the United States should have said so. But that proposition on its face makes no sense because the effect on the carriers is the same – they must look for and consider tobacco markings and labels.[2]

There are two other pertinent points to make regarding the United States' support of bans on delivery of tobacco. United States Br. at 17-18. First, in order to comply with such a ban, the carrier must do exactly the same things it must do to comply with the second part of section 1555-D – take account of tobacco markings and labels, which the United States ignores. Second, it would be a strange Congressional purpose that allows states to totally *ban* the delivery of tobacco products but prevents states from *regulating* tobacco products in a manner which allows them to be delivered under certain circumstances.

2. As to 22 Me. Rev. Stat. Ann. § 1555-C(3)(C), the United States correctly rejected the "reference to" theory

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[2] In its discussion on this point, the United States highlights yet another problem with the First Circuit decision. The United States relies upon the appeals court's conclusion that the first part of section 1555-D – the prohibition against knowing delivery of tobacco – is not preempted because it does not "require that carriers modify their delivery methods other than by declining to transport a product that Maine has legitimately banned." United States Br. at 13. Elsewhere, however, the lower court rejected that very argument when made by petitioner regarding section 1555-C(3)(C). (Pet. App. at 24) ("The Attorney General's alternative argument – that there is no preemption because a carrier can forgo certain tobacco-product deliveries in Maine – also fails.") In addition, the lower court did not apply that reasoning to the second part of section 1555-D which imputes knowledge of markings and labels to a carrier. The lower court's internal inconsistency on this point is yet another reason to grant the petition.

asserted by respondents and adopted by the First Circuit (Pet. App. 23). United States Br. at 8-9. Instead, the United States went on to support the First Circuit's decision with an argument that a court "might well conclude" that section 1555-C(3)(C) is not preempted if the service required by that provision was "generally offered," but the United States concluded "*no* carrier offers [it] in the marketplace." United States Br. at 11-12, & 19 ("To the extent such an adult-only-signature service is commercially available, a state law requiring shippers to utilize such a service would not . . . be a law 'related to' motor carriers"). The United States acknowledges that if "carriers had made an independent commercial decision to offer a service [it] would be strong evidence that, as Congress intended, the carriers' '[s]ervice options [were] dictated by the marketplace; and not by an artificial regulatory structure.'" *Id.* at 11.

The lower courts, however, took the opposite approach, and rested their decisions entirely upon UPS's experience because, as argued by respondents, so long as a *single* carrier did not provide the prescribed service and therefore was affected by the Maine law, that law was preempted. (Pet. App. 9-10, 68, 79-80). Petitioner unsuccessfully argued that the courts should consider other carriers but the lower courts' "single carrier" decisions foreclosed evidence on that theory.[3] The United States' reading of the FAAAA, therefore, is directly contrary to that of the First Circuit, allows consideration of the experiences of more than a single carrier to determine the availability of the service in the marketplace, and would

[3] Below, respondents successfully avoided petitioner's discovery requests regarding their other carrier members' services.

require the First Circuit to remand the issue to be developed and resolved.[4] In sum, the United States asks this Court to deny the petition on the basis of a legal theory not relied upon by the lower court.

Importantly, UPS provides a service that would allow it to comply with Maine law without doing anything new. The United States draws a distinction between a "recipient" and an "addressee," (United States Br. at 11-12), a difference not made on UPS's website.[5] In any case, under UPS's preexisting standard operating procedures, if any delivery (be it general, "signature required," or "adult signature required") cannot be made for whatever reason, the UPS deliveryman returns the package to the local UPS facility for pickup by the recipient.[6] In deliveries requiring

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[4] Because respondents have the burden of proof, it is incumbent upon them to demonstrate that this service was not available, but they made no effort to do so because of their theory of the case.

[5] According to UPS's website, the recipient is the person or entity that the shipper puts on the label. UPS, *How to Prepare for Shipping*, <http://www.ups.com/content/us/en/resources/prepare/guidelines/prepare_package4.html> (visited May 29, 2007). The UPS provides the following services for a small additional fee:

> **Signature Required:** UPS will obtain the recipient's signature and provide you with a printed copy. You may also view the recipient's signature online.
>
> **Adult Signature Required:** UPS will obtain the adult recipient's signature and provide you with a printed copy. Adult recipients must be at least 21. You may also view the adult recipient's signature online.

UPS, *Delivery Confirmation*, <http://www.ups.com/content/us/en/shipping/time/service/value_added/delivery.html> (visited May 29, 2007).

[6] UPS returns the package to the local UPS facility after three delivery attempts, to be held for pickup by the recipient within five days. There is no extra charge for this procedure, which appears to be built into the cost of standard, recipient-signature, and adult-recipient-signature services. UPS, *Learn About the UPS InfoNotice*,

(Continued on following page)

an adult signature, contrary to the United States' suggestion, UPS does not simply leave the package with "whoever answers the door" such as a ten-year old. United States Br. at 12.

The United States asserts that a state law is preempted only if it has a "significant" or "dramatic" effect on carrier services. United States Br. at 9, 10. The question then is whether the application of this preexisting procedure to a purportedly new "addressee" service has such a "dramatic effect." It is hard to see how applying UPS's present "failure of delivery" procedures to an "adult-*addressee*-signature" delivery as compared to the present "adult-*recipient*-signature" delivery, to the extent the two are different, would have a significant effect. Respondents presented no evidence or study explaining how its preexisting procedures regarding failures of delivery for its "adult-*recipient*-signature" service when applied to an "adult-*addressee*-signature" service would have "significant" and "dramatic" impacts. (Pet. App. at 28 n.14, 65 n.92). Indeed, petitioner specifically sought in discovery studies on the effect of Maine's law on UPS's operations, and were told there were none.

The lower court, moreover, did not apply a "dramatic" effects test, but rather utilized a strict "affecting timeliness and effectiveness" standard. (Pet. App. at 23). At the very least, this reveals that the appeals court, the United States and the respondents do not agree on the appropriate standard for preemption under the FAAAA, calling for consideration of the issue by the Court.

<http://www.ups.com/content/us/en/tracking/help/tracking/inonotice.html> (visited on May 29, 2007).

3. The United States does not dispute that Maine's laws are enacted not as economic regulation but as efforts to protect the public health. Nor does the United States disagree with the bedrock principle that such a law is not preempted unless Congress unambiguously intended to do so. Nowhere does the United States identify any intent by Congress to preempt tobacco delivery laws. The United States argues, as previously noted, that for FAAAA preemption to be found, a carrier must prove "significant" and "dramatic" effect. United States Br. at 9, 10. Thus, the United States does not agree with respondent that any law referring to or affecting a carrier is preempted. The United States, however, ignores the only evidence in the record that the "effect" of the second part of section 1555-D on UPS's existing inspection procedures is less than one cent per package. Thus, the United States' application of the standard it proposes to the undisputed facts mandates a conclusion opposite to the one it reached. The United States cannot seriously argue that when Congress passed the Synar Amendment[7] and the FAAAA, Congress intended the absurd result that states could not regulate deliverers of tobacco because of such a small cost.

According to the United States, because the Synar Amendment did not specifically mention third party carriers and such carriers are not the classic tobacco "distributor," the FAAAA trumps both the Synar Amendment and preexisting state police powers. United States Br. at 16-17. The Synar Amendment uses the broadest of language, requiring a state to have "in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such

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[7] ADAMHA Reorganization Act, Pub. L. No. 102-321, Title II, § 202, 106 Stat. 394 (42 U.S.C. § 300x-26).

product to any individual under the age of 18." 42 U.S.C. § 300x-26. There is no dispute that the carriers are part of the tobacco distribution system and profit from it. And, at the very least, under the United States' reasoning, because the Synar Amendment applies to *retailers*, Congress approved of and encouraged state laws such as section 1555-C(3)(C) that regulate how *retailers* "distribute" tobacco, and there is nothing in the language or legislative history of the FAAAA that suggests otherwise.

4. The FAAAA's exceptions, 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(B), were clearly intended by Congress to be illustrative of state non-economic regulations that were not "related to a price, route or service." H.R. Conf. Rep. No. 103-677, at 84, 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756, 1758-60 (specific exceptions "were not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted.") Like the First Circuit, the United States wholly discounts that intent. United States Br. at 14-15. What the United States is saying is that because the "not . . . all inclusive" list of exceptions is not all inclusive, Congress intended that the list be "all inclusive." The United States' perspective simply defies the legislative history and common sense.

5. Regarding the conflict with other circuits, under a fair reading, it is doubtful that the court in *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1087 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999), would conclude that a state law that requires carriers to look for tobacco markings (while they are also looking for other markings) at an additional cost of less than a penny per package, would "*acutely* interfere" with carriers' fundamental operations. United States Br. at

19-20. That court found a law that increased prices by as much as 25 percent was not preempted by the FAAAA. *Mendonca*, 152 F.3d at 1189. Under the Ninth Circuit's reasoning, tobacco delivery laws like those of Maine would be considered non-economic public health laws, so as to be outside the preemptive ambit of the FAAAA.

CONCLUSION

The United States' recommendation does not provide a solution to the practical problems of tobacco enforcement raised by the First Circuit's decision, relies upon interpretations of the FAAAA that were either rejected or not considered at all by the First Circuit, and refutes the appeals court's "reference to" approach. The United States' brief, therefore, raises more questions than it answers, buttressing rather than undermining this petition which seeks to clarify the preemptive effect of the FAAAA on state tobacco laws.

Respectfully submitted,

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